United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 20-0733**
	)	**Issued: August 3, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Boynton Beach, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 14, 2020 appellant, through counsel, filed a timely appeal from a December 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the December 18, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on May 22, 2019, as alleged.

FACTUAL HISTORY

On May 31, 2019 appellant, then a 41-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that at approximately 12:00 p.m. on May 22, 2019 she was exposed to a substance inside of packages that were believed to be toxic while in the performance of duty. She explained that her nose became irritated and started burning when she received the first package, and claimed that her throat started to close when she received the second package. On the reverse side of the claim form, appellant's supervisor indicated that she did not know if appellant was injured while in the performance of duty and that she would need more information from her. Appellant did not stop work.

In a May 26, 2019 medical report, Dr. Jonathan Polhemus, Board-certified in family medicine, noted that appellant informed him that she received a semi-transparent package at work with questionable specimens and thereafter began experiencing a burning sensation in her nose and eyes, a sore throat, and a cough. She denied any recent travel or contact with pets, new carpets, or other potential irritants. Appellant submitted an unsigned diagnostic report of even date in which an x-ray of her chest showed no acute disease. On evaluation of her diagnostic report and several lab tests, Dr. Polhemus diagnosed cough, allergic reaction, and sore throat. He prescribed medication to treat her symptoms and advised her to follow up at her next appointment.

In a development letter dated June 7, 2019, OWCP advised appellant of the deficiencies of her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It provided a factual questionnaire for her completion. OWCP afforded her 30 days to provide the necessary information.

In a June 9, 2019 medical report, Dr. Mazin Shikara, Board-certified in internal medicine, reviewed the history of appellant's symptoms related to the alleged May 22, 2019 employment incident. He diagnosed cough and allergic reaction and recommended that she be evaluated by a toxicologist or occupational medicine doctor. In a duty status report (Form CA-17) of even date, Dr. Shikara again diagnosed cough and recommended that appellant be seen by the proper doctor to treat her condition.

In a June 13, 2019 medical report, Christina Simpson, a physician assistant, indicated that appellant's symptoms related to the alleged May 22, 2019 employment incident had worsened over three weeks. She noted appellant's diagnoses of a cough and irritation in both eyes. In a state workers' compensation form of even date, Ms. Simpson checked a box marked "undetermined as of this date" with regard to whether appellant's illness was work related. In a June 13, 2019 Form CA-17, she diagnosed cough due to the alleged May 22, 2019 employment incident.

In a June 21, 2019 medical report, Antonio Abreu, a registered nurse, noted that appellant informed him that the itching and coughing she had experienced since the alleged employment incident had worsened and that she needed a refill of her prescriptions. He diagnosed cough, rash

and nonspecific skin eruption, irritation of both eyes and pruritus, unspecified. Dr. Abreu prescribed medication to treat appellant's symptoms.

By decision dated July 8, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as she described. It noted that she did not respond to its June 7, 2019 development questionnaire and did not provide a factual statement to substantiate that the May 22, 2019 injury occurred.

OWCP continued to receive evidence. In a July 2, 2019 diagnostic report, Dr. William Tuer, a Board-certified allergist and immunologist, performed an antinuclear antibodies (ANA) screening that returned negative suggesting that no ANA-associated autoimmune diseases were present.

On July 29, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 26, 2019 medical report, Dr. Tuer reviewed appellant's history of injury related to the alleged May 22, 2019 employment incident. Appellant explained that she suspected there was an indoor mold problem at the employing establishment. On evaluation, Dr. Tuer diagnosed rhinitis, unspecified, and cough.

In a June 30, 2019 diagnostic report, Dr. Tuer performed a Tryptase test and indicated that measuring both forms of Tryptase increases sensitivity for the diagnosis of mastocytosis, and mast cell degranulation as a cause of anaphylaxis.

In a July 5, 2019 diagnostic report, Dr. Tuer conducted an ova and parasites stool test and determined that no ova or parasites were present.

In a July 19, 2019 medical report, Mr. Abreu saw appellant and diagnosed cough, rash and other nonspecific skin eruption, irritation of both eyes, and pruritis. He noted that he assisted her with completing her workers' compensation forms and refilling her prescriptions.

In a July 29, 2019 attending physician's report (Form CA-20), Mr. Abreu diagnosed a cough, rash, irritation of both eyes, and pruritus and checked a box marked "no" indicating that appellant's condition was not caused or aggravated by her federal employment.

In an August 2, 2019 Form CA-17 Shannon Snyder, a physician assistant, diagnosed allergic rhinitis due to the alleged May 22, 2019 employment incident and recommended work restrictions for appellant.

In an August 20, 2019 medical report, Ms. Snyder evaluated appellant for a follow up after her allergy testing. She noted that appellant experienced further symptoms when she returned to work and diagnosed allergic rhinitis due to pollen and allergic rhinitis due to animal hair and dander.

In an August 28, 2019 medical report, Dr. Tuer reviewed a 48-hour patch reading and noted that it was positive for contactants, thiuram and cobalt. He diagnosed allergic rhinitis due to pollen, allergic contact dermatitis due to metals, allergic contact dermatitis due to other chemical products, other allergic rhinitis and shortness of breath.

In a September 18, 2019 medical report, Dr. Clive Roberson, a Board-certified allergist and immunologist, evaluated appellant for her history of shortness of breath, rhinitis, and conjunctivitis, which she experienced while in a specific area at work. He diagnosed allergic rhinitis due to animal hair and dander, allergic rhinitis due to pollen, chronic rhinitis, and cough.

In an October 5, 2019 medical form, Dr. Tuer requested that appellant be allowed to remain off work due to her condition. He explained that she was currently undergoing medical investigation for a possible toxic reaction due to the alleged May 22, 2019 employment incident.

In an October 14, 2019 medical note, Dr. Tuer indicated that appellant was still experiencing symptoms and requested that she be transferred to a different workstation.

Appellant also submitted an undated Form CA-20 in which Ms. Simpson diagnosed cough and irritation of both eyes and checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by her federal employment.

A telephonic hearing was held on November 13, 2019. Appellant detailed the alleged May 22, 2019 employment incident and stated that she was feeling fine before she began her shift and received two packages. She explained that a customer brought in two packages to her window and her eyes started to feel irritated, her nose started burning, her throat felt like it was locking down, and her skin began to itch. Appellant asked the customer immediately what was in the packages because she felt dizzy, but he did not answer. No hazardous material inspection was conducted and the packages were not isolated. Appellant also noted that she did not notice a powder, liquid, or other substance coming from the packages. She later went to the hospital on September 26, 2019 after her symptoms continued to worsen. Appellant reported that she never had any problems with her lungs, allergic reactions, asthma or sinus infections. Her physician explained that it was difficult to define the trigger because the packages were not isolated, and that he would not know for sure what caused her symptoms. Drs. Tuer and Roberson opined that she would require constant treatment if she did not change her work location as she still experienced problems when she returned to work. The hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated December 18, 2019, OWCP's hearing representative affirmed the July 8, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[5] that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally

[4] *Id*.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

related to the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.[8] Generally, fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[9] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[10]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[11] The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[12] An employee's statements alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that the claimed May 22, 2019 employment incident occurred in the performance of duty as alleged.

On her May 31, 2019 Form CA-1, appellant alleged that at approximately 12:00 p.m. on May 22, 2019 she was exposed to an unknown substance inside of a package. She explained that her nose became irritated and her throat began to close shortly after she began handling packages. No other information or statement clarifying what employment duties were involved to have

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[9] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

[12] *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

[13] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

caused her claimed injury on May 22, 2019 was provided. Appellant failed to provide any description or details of the alleged May 22, 2019 incident sufficient to determine the circumstances surrounding her injury.[14]

In a May 26, 2019 medical report, Dr. Polhemus indicated that appellant received a semi-transparent package at work with questionable specimens and thereafter began experiencing a burning sensation in her nose and eyes, as well as a sore throat and cough.

In a development letter dated June 7, 2019, OWCP informed appellant that the evidence of record was insufficient as she had not sufficiently described the May 22, 2019 employment incident alleged to have caused her injury. It asked her to describe the alleged incident in detail, but she did not respond to the request for additional specific factual information.[15]

During the November 13, 2019 telephonic hearing, appellant asserted that she was feeling fine before she received the two packages alleged to have caused her injury. She explained that, despite her eyes, nose, throat, and skin being irritated by the packages, no hazardous material inspection was conducted and the packages were not isolated. Appellant continued, noting that she did not notice any powder, liquid or other substance coming from the packages.

The Board notes that the only explanation pertaining to the alleged May 22, 2019 employment incident was appellant's generalized recount of the event during the November 13, 2019 telephonic hearing where she alleged that her symptoms were caused by two packages. She, however, did not reference a specific substance and did not allege exposure with sufficient specificity with regard to the characteristics of the substance. While she sought treatment from Dr. Polhemus on May 26, 2019, he only recounted that she received a package with "questionable specimens" before she began experiencing her symptoms. By failing to respond to the questionnaire, failing to describe the specific employment incident and circumstances surrounding her alleged injury, and failing to provide a history of injury when seeking medical treatment, appellant has not established that the traumatic injury occurred in the performance of duty, as alleged.[16] Accordingly, the Board finds that she has not met her burden of proof.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the May 22, 2019 employment incident occurred in the performance of duty, as alleged.

[14] *K.S.*, Docket No. 17-2001 (issued March 9, 2018).

[15] *Id.*; *see also K.W.*, Docket No. 16-1656 (issued December 15, 2016).

[16] *See H.B.*, Docket No. 18-0278 (issued June 20, 2018); *John R. Black*, 49 ECAB 624 (1998); *Judy Bryant*, 40 ECAB 207 (1988); *Martha G. List*, 26 ECAB 200 (1974).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board